that there was a preconceived plan to which the appellant was privy, to cause injury to the complainant.

I regret I could find no basis for the learned magistrate not requiring a probation report on the appellant. At the time of the offence he was 18 years old. My perusal of the case law shows it has been repeatedly stated that in the case of a person of young age who is liable to be sentenced to a term of imprisonment, it is always desirable that a probation report on him be obtained. This was said more than 35 years ago by Bellamy J in *Tukiran bin Taib* v *PP*,[5] by Smith J in *Teh Yew Whatt* v *PP*,[6] by Ambrose J in *Tan Kah Eng* v *PP*[7] and by Chang Min Tat J, as he then was, in *Lim Yoon Fah* v *PP*.[8] I therefore asked for and obtained a probation report on the appellant.

A perusal of the National Registration Identity Card of the appellant which I called for disclosed that he was born on 26 May 1970. The probation report did not disclose anything adverse to the appellant.

Notwithstanding all this, the admitted fact remains that the appellant chased and stabbed the complainant with a knife in a public place. The medical report on the latter discloses that the wounds inflicted were severe. In the circumstances, I do not consider the sentence of 12 months imprisonment to be manifestly excessive. However, it is not known whether in imposing sentence the learned magistrate had in mind that the appellant was detained on 7 September 1988 when he surrendered to the police and remained in custody till 19 February 1989.

Accordingly, I am of the view that in the ordinary course of events the period of his detention should have been taken into consideration and deducted from the sentence of 12 months. If the sentence is to run from today he would have to serve a term of about 1 month and 18 days, so his counsel reckoned. But he has behaved himself to date and there seems to be no purpose at this stage in sending him to prison. However, I shall ensure that as far as possible he will not get into trouble again. I therefore order that the sentence of one year be set aside and there be substituted therefor a bond under s 294 of the Criminal Procedure Code, in the sum of $5,000 with two sureties for two years.

Order accordingly.

Solicitors: *Aiyathurai & Co.*

Reported by *S Surenthiraraj*

United Malayan Banking Corp Bhd v Mideast Development Sdn Bhd & Ors

HIGH COURT (JOHORE BAHRU) — CIVIL SUIT NO 149 OF 1981
ABU MANSOR J
31 JANUARY 1990

Civil Procedure — Judgment in default of defence — Interest on judgment debt in excess of statutory rate and extending beyond date of judgment — Whether judgment can be set aside ex debito justitiae — Rules of the High Court 1980, O 42 r 12

Contract — Interest on instalment payments — Variation of interest rates — Whether variation can be unilateral

The second defendant applied to set aside judgment in default of defence entered against him on the ground that the judgment debt, carrying interest at 15% pa until payment, was wrong and as such could be set aside ex debito justitiae. It was argued for the second defendant that 15% interest was incorrect as the guarantee on which the claim was based carried interest at 12% pa. It was also argued that before there could be a variation of the interest rate there should be a notice of variation. Further, interest should only be up to the date of judgment and be at the 8% rate thereafter. The plaintiff alleged that the interest rate had been varied to 15% and as such this became the new contractual rate. They also argued and showed authority for the view that post-judgment interest at the contractual rate is permissible if the contract provided for an independent covenant which was not extinguished by the judgment.

Held, allowing the second defendant's application:

(1) The plaintiff is not permitted to have interest at more than 8% pa after judgment. Allowing more than 8% interest after judgment is only permitted if there is a contractual agreement providing for that. Since the plaintiff entered judgment with the rate of interest after the date of judgment far in excess of the statutory rate of 8% pa, the second defendant has a right ex debito justitiae to have the judgment set aside.

(2) As regards interest up to judgment, this should be at the contractual interest rate. It is clear that there should be a written notice given to the second defendant before interest can be varied. Upon the plaintiff failing to produce such a notice of variation up to 15%, and on the second defendant's allegation that he was given no notice, the second defendant has a plausible defence to this action.

(3) The second defendant was ordered to pay all costs in any event thrown away or incurred by the plaintiff, including solicitor and client costs to be taxed.

(4) Order was granted in terms of other consequential orders as regards entering appearance and a stay of all proceedings pending this application. This was only to take effect after settlement in full by the second defendant of all taxed costs, with liberty to the plaintiff to apply in the event of default by the second defendant in complying with or carrying out the terms granted to him to defend the action.

[Bahasa Malaysia summary

Defendan kedua telah memohon untuk mengenepikan penghakiman ingkar pembelaan yang dimasukkan terhadapnya atas alasan bahawa hutang penghakiman, yang membawa faedah 15% setahun sehingga pembayaran, adalah salah dan oleh

yang demikian boleh diketepikan ex debito justitiae. Adalah dihujahkan bagi defendan kedua bahawa faedah 15% adalah tidak betul kerana jaminan atas mana tuntutan dilakukan membawa faedah pada 12% setahun. Adalah juga dihujahkan bahawa sebelum sebarang penukaran kadar faedah boleh dilakukan, notis penukaran mesti diberikan. Tambahan pula, faedah seharusnya sehingga tarikh penghakiman sahaja dan pada kadar 8% selepas itu. Plaintif mendakwa bahawa kadar faedah telah ditukar kepada 15% dan ini telah menjadi kadar kontrak yang baru. Mereka juga menghujahkan bahawa dan menunjukkan autoriti untuk pandangan bahawa faedah selepas penhakiman pada kadar kontrak adalah dibenarkan jikalau kontrak memperuntukkan satu waad yang berasingan yang tidak dihapuskan oleh penghakiman.

Diputuskan, membenarkan permohonan defendan kedua:

(1) Plaintif tidak dibenarkan mendapat faedah yang lebih daripada 8% setahun selepas penghakiman. Feadah selepas penghakiman yang lebih daripada 8% hanya dibenarkan jikalau terdapat satu perjanjian secara kontrak yang memperuntukkan demikan. Oleh sebab plaintif memasukkan penhakiman dengan kadar faedah yang jauh melebihi kadar statutori pada 8% setahun selepas tarikh penghakiman, defendan kedua mempunyai hak ex debito justitiae untuk mengenepikan penghakiman itu.

(2) Berkenaan faedah sehingga penghakiman, ini mestilah pada kadar faedah kontrak. Adalah jelas bahawa suatu notis bertulis mesti diberikan kepada defendan kedua sebelum faedah boleh ditukar. Atas kegagalan plaintif untuk mengeluarkan satu notis penukaran kepada 15%, dan atas dakwaan defendan kedua bahawa dia tidak diberi notis, defendan kedua mempunyai pembelaan yang munasabah ke atas tindakan ini.

(3) Defendan kedua adalah diperintah untuk membayar semua kos dalam apa-apa keadaan yang hangus atau yang dialami oleh plaintif, termasuk kos peguamcara dan pelanggan yang ditetapkan.

(4) Perintah juga dibuat mengenai segala perintah yang bersangkutan seperti kemasukan kehadiran dan penggantungan segala prosiding menunggu permohonan ini. Ini hanya akan berkuatkuasa selepas penyelesaian penuh oleh defendan kedua untuk semua kos yang ditetapkan. Plaintif adalah dibenarkan membuat permohonan sekiranya defendan kedua ingkar menunaikan syarat yang diberikannya untuk membela tindakan itu.]

Cases referred to

1 *Malayan United Bank Bhd* v *Mohammed Salleh bin Mohammed Yusoff & Ors* [1988] 3 MLJ 165 (folld)
2 *Supreme Finance (M) Bhd* v *Koo Sin Ken* [1987] 1 MLJ 296 (refd)
3 *Malaysia Building Society Bhd* v *Lim Kheng Kim* [1988] 3 MLJ 175 (not folld)
4 *Hughes* v *Justin* [1894] 1 QB 667 (folld)

Legislation referred to

Rules of the High Court 1980 O 42 r 12

Balwant Singh Sidhu for the applicant second defendant.
Tan Hock Kim for the respondent plaintiff.

Cur Adv Vult

Abu Mansor J: The second defendant in this suit applied for the setting aside of the judgment in default of defence entered against him on 16 December 1981 ('the judgment') and if he succeeds he applies for the other consequential orders granting time to him to file his memorandum of appearance and stay of all the proceedings pending this application and costs.

The facts of the case are as follows. The second defendant together with the third defendant on the 12 October 1979 became joint and several guarantors for the repayment of a loan granted to the first defendant. The first defendant defaulted in repayment and was in arrears of some $150,920.37. The plaintiff bank then brought an action against all the three defendants claiming the sum of $154,467.91 with interest thereon at the rate of 15% pa from 26 May 1981 on monthly rests calculated on a daily basis until full payment or realization.

When the three defendants defaulted in entering their defence, judgment was entered against them on the 16 December 1981. By the second defendant's summons-in-chambers dated the 26 April 1988 subsequently amended and redated 8 January 1989 he applied to have the said judgment set aside.

Mr Balwant Singh on behalf of the second defendant while referring us to para 3 and para 4 of the affidavit the second defendant affirmed on 13 January 1989 contended that the said judgment, which carries interest at 15% pa from 26 May 1981 calculated on a daily basis from judgment until payment, was wrong as the guarantee on which the claim was based carried interest at 12% pa on the outstanding balance. He also contended that under the contract of guarantee before there can be variation there should be a notice and there was no such notice other than entry of increase of 15% interest in the borrower's statement of account. He also contended that assuming that the 15% interest were correct it should only be up to the date of the judgment and it can only carry 8% pa thereafter. The issue, he said, before the court is whether the said judgment carrying that interest should be allowed to stand.

He submitted that the said judgment was before the 12 December 1986 amendment. Allowing more than 8% pa interest after judgment is only permitted after that amendment if there is a contractual agreement providing for that. He submitted the court had no jurisdiction to grant interest of more than 8% pa. Since the court did not have jurisdiction to give such interest he submitted that judgment ought to be set aside. For the proposition that the court lacked jurisdiction he cited *Malayan United Bank Bhd* v *Mohammed Salleh bin Mohammed Yusoff & Ors*[1] where Zakaria Yatim J allowed an application to set aside the judgment in default entered on 29 November 1985 since the old rule then in force was that a plaintiff cannot claim, from the date of judgment, that interest rate as agreed if such rate is more than 8% pa. Counsel also referred the court to

p 169 of the *Malayan United Bank Bhd* case[1] where the learned judge said:

> Since the respondent had entered judgment with the rate of interest after the date of judgment far in excess of the statutory rate of 8% pa, the applicant has a right ex debito justitiae to have the judgment set aside.

If the court agreed that the second defendant has that right then the question of delay, he submitted, is irrelevant.

In support he also cited *Supreme Finance (M) Bhd* v *Koo Sin Ken*[2] which the learned judge quoted with approval.

Mr Tan for the respondent in reply contended that there can be interest of 15% pa and in this case he contended it can continue after the date of judgment. He cannot agree that interest should be 8% pa from the date of judgment. He elaborated that interest can be more than 8% after judgment if the contract between the parties allows that to be so and it is so stated in the contract. He cited the case of *Malaysia Building Society Bhd* v *Lim Kheng Kim & Ors*[3] where Edgar Joseph Jr J dismissed a similar application to set aside the judgment obtained in default of appearance holding that the covenant for the payment of interest was not merely ancillary to but was an independent covenant and was not extinguished in the judgment (dated 18 March 1986), the doctrine of merger being inapplicable.

What I must decide here firstly is the issue of the post-judgment debt. Is the judgment entered giving interest until realization permissible having regard to it being a judgment prior to the PU(A) 445 amendment dated 29 October 1986?

After having considered the authorities placed before me, I find the applicant's application to have the judgment set aside on the ground that the plaintiff is not permitted to have interest more than 8% pa to have merit. The facts of this case and the facts of *Malayan United Bank Bhd* v *Mohammed Salleh bin Mohammed Yusoff*[1] and those in *Malaysia Building Society Bhd* v *Lim Kheng Kim*[3] are similar wherein each guarantor signed a joint and several guarantee and indemnity to secure performance by a borrower. With respect I am unable to accept the judgment of Edgar Joseph Jr J in *Malaysia Building Society Bhd* v *Lim Kheng Kim.*[3] He said whether post-judgment interest is permitted would depend on whether the interest provision is contained in an independent covenant of the contract of guarantee. The learned judge then made an admirable survey of the relevant cases which showed that post-judgment interest is permissible if the contract provided for an independent covenant and the cases showed that it is not extinguished by the judgment. With respect that may well be the supporting authority but I cannot help asking myself what was the law governing such interest pre the 1986 amendment? With respect the answer I get is that the judgment of Zakaria Yatim J in *Malayan United Bank Bhd* v *Mohammed Yusoff*[1] has, in my view, placed correctly the law applicable at that time regarding interest. Under O 42 r 12 applicable then, the judgment allowing interest more than 8% pa from judgment to realization is irregular as it infringed that order. I also agree, with respect, with Zakaria Yatim J's decision where he approved *Hughes* v *Justin*[4] at p 169 of his judgment that since the respondent had entered judgment with the rate of interest after the date of judgment far in excess of the statutory rate of 8% pa, the second defendant/applicant has a right ex debito justitiae to have the judgment set aside. Since that is my decision the question of delay no longer, in my view, becomes relevant since there should not have been such judgment in the first place.

The other matter that I have to consider before the second defendant can succeed in having the in default of defence judgment set aside is the question whether the second defendant has a defence to this action. It is clear from the submission of counsel for the second defendant and the term of the contract of guarantee and indemnity that a written notice has to be given to the second defendant before the rate of interest can be varied. What the respondent had shown was that there was a statement of account belonging to the first defendant borrower showing the interest having been increased to 15% but the respondent had not been able to produce a notice as such informing the respondent of the increase which is a term of the guarantee. Assuming that this is so and the second defendant's allegation that he was given no notice is correct it will form part of his defence deserving consideration by the trial court. I therefore rule that he has a plausible defence to this action.

For the reasons given, I allow the application of the second defendant subject to him paying all costs in any event thrown away or incurred by the respondent plaintiff up to the stage in pursuing his claim including solicitor and client costs, such costs to be taxed by a proper officer of the court.

I also give an order in terms of the other consequential prayers prayed for by the second defendant such orders only taking effect after settlement in full by him of all taxed costs with liberty to the respondent to apply in the event of default by the second defendant in complying or the carrying out of the terms hereby granted to him to defend this action.

Application allowed.

Solicitors: *Balwant Singh Sidhu & Co; Tan & Tan.*

Reported by *Azra Moiz*